No. 87-570

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

Nicholas Colafella, K. Leroy Irvis,
James J. Manderino, Matthew J. Ryan,
and the Bipartisan Committee for the
Administration of the House of Representatives,
Petitioners,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE ASSEMBLY OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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I. QUESTION PRESENTED AND STATEMENT OF THE CASE

The Question Presented and Statement of the Case are fully set forth in Petitioners' Petition for a Writ of Certiorari herein and *Amicus Curiae* adopts and incorporates the same.

II. INTEREST OF *AMICUS CURIAE*

1. *Amicus Curiae* the Assembly of the State of New York (herein "the Assembly") is a legislative entity empowered by the Constitution and laws of the State of New York to legislate on behalf of the people of the State.

2. Crucial to the Assembly's ability to perform its legislative duties is the power to conduct investigations in order to gather information and viewpoints on matters requiring legislative attention.

3. New York Legislative Law Article 4 empowers legislative standing committees, duly-constituted subcommittees thereof, and joint legislative committees of both Houses to conduct investigative hearings both public and private, to compel the attendance of witnesses and the production of documents, to administer oaths and to confer immunity.

4. Pursuant to such authorization, the Assembly regularly conducts such investigations, and it is expected that such investigations shall continue to be conducted in the future.

5. Confidentiality of testimony and anonymity of witnesses at legislative hearings has often proved to be an indispensable element of legislative committees' ability to obtain information necessary to the success of such investigations. In recognition of this important element of the investigative function, section 73(8) of the New York Civil Rights Law provides that "no testimony or other evidence adduced at a private hearing [as defined herein] . . .shall be disseminated or made available to the public

by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. A person who violates the provisions of this subdivision shall be guilty of a misdemeanor."

6. Assembly experience demonstrates that, without an absolute assurance of confidentiality and/or anonymity, a great deal of information central to the success of its investigations would not have been made available. Examples include the following:

a) A joint legislative investigation of the problem of child abuse relied upon testimony of individuals who testified only when absolute assurance was given that their testimony and identities would be kept confidential.

b) Numerous investigations of state and municipal agencies have relied upon the confidential testimony of the employees thereof.

c) Investigations of state correctional institutions have relied upon legislative access to inmate records on a confidential basis.

7. The continued viability of the decision of the Third Circuit Court of Appeals herein will severely hamper the Assembly's ability to conduct investigations crucial to its effective performance of the legislative function, in that the Assembly will be unable to give absolute assurance of confidentiality in order to obtain information necessary to the success of such investigations.

8. The protection of state legislative committees from forced disclosure of documents and information is necessary to preserve the investigative function essential to the lawmaking process.

III. ARGUMENT

A. This case presents an important question of federal law which has not been, but should be, settled by this Court.

The issue raised by this case is of fundamental importance to *Amicus* in that it threatens the ability of the Assembly to perform its legislative function through the investigations conducted by its committees free from the threat of interference by federal authorities. *Amicus* relies in the performance of such function upon the doctrine of legislative immunity, which the Court of Appeals for the Third Circuit failed to recognize under the instant facts. The parameters, scope and extent of the privilege of information gathered by state legislative investigations has not been, but should be, determined by this Court. *Amicus* submits that the principles underlying the Speech and Debate Clause of the United States Constitution and the comparable provision of the New York State Constitution, Art. III, Sec. 11, should be interpreted to immunize state legislative committee materials from subpoena by federal authorities, and in support thereof adopts and incorporates the argument of Petitioners' Petition for a Writ of Certiorari herein.

B. The decision of the Court of Appeals conflicts with decisions of the United States Courts of Appeals for the First Circuit in *In re Hampers* and the Second Circuit in *Star Distributors, Ltd. v. Marino* and misconceives *United States v. Gillock*, the implications of which are in need of clarification by this Court.

Amicus adopts and incorporates the arguments on these points in Petitioners' Petition for a Writ of Certiorari herein.

IV. CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 4, 1987

APPENDIX

NEW YORK LEGISLATIVE LAW

Sec. 60. Testimony before legislative committees. A legislative committee may require the attendance of witnesses in this state whom the committee may wish to examine, or may issue a commission for the examination of witnesses who are out of the state or unable to attend the committee or excused from attendance, which commission if directed by the house or legislature by which the committee is appointed may be executed during the recess of the legislature. A commission issued as provided by this section shall be in the form used in the courts of record of this state and shall be executed in like manner. Unless otherwise instructed by the committee appointing them the commissioners shall examine privately every witness attending before them and shall not make public the particulars of such examination. No committee of either house or a joint committee of both houses shall have the power to take testimony at a private hearing or at a public hearing unless at least two of its members are present at such hearing.

Sec. 61. Subcommittees. Whenever any committee of either house or a joint committee of both houses of the legislature shall be required to make an inquiry or investigation, such committee may appoint a subcommittee of not less than three of its own members to make such inquiry or investigation, and to take testimony in relation thereto; and such committee or subcommittee and the chairman thereof shall respectively have all the powers and authority, which are conferred by law upon any committee which is authorized to send for persons or papers, or upon the chairman thereof. No subcommittee shall have the power to take testimony at a private hearing or at a public hearing unless at least two of its members are present at such hearing.

Sec. 62. Witnesses' fees. Any person attending as a witness under the provisions of the last two sections shall receive the same fees as are allowed witnesses in civil actions in courts of record. Such

fees need not be prepaid, but the comptroller upon the certificate of the chairman of the committee, and proof by affidavit or otherwise that the same is due, shall draw his warrant for the payment of the amount thereof.

Sec. 62-a. Subpoenas; oaths. The chairman, vice-chairman or a majority of a legislative committee may issue a subpoena requiring a person to attend before the committee and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the committee, and, in a proper case, to bring with him, a book or paper. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a legislative committee as authorized by this section. Any member of a legislative committee may administer an oath to a witness.

Sec. 62-b. Joint legislative committee competent authority to confer immunity. In any inquiry or investigation by a joint legislative committee, such committee is a competent authority to confer immunity in accordance with section 50.20 of the criminal procedure law. Immunity may be conferred only upon the concurrence of a majority of the full membership of such committee and provided that at least twenty-four hours prior written notice is given to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein.

NEW YORK CIVIL RIGHTS LAW

Sec. 73. Code of fair procedure for investigating agencies. 1. As used in this section the following terms shall mean and include:

(a) "Agency". A standing or select committee of either house of the legislature or a joint committee of both houses; a duly authorized subcommittee of any such legislative committee; the commissioner of investigation acting pursuant to section eleven of the executive law; a commissioner appointed by the governor

acting pursuant to section six of the executive law; the attorney general acting pursuant to subdivision eight of section sixty-three of the executive law; any temporary state commission or any duly authorized subcommittee thereof which has the power to require testimony or the production of evidence by subpoena or other compulsory process in an investigation being conducted by it; and any standing or select committee, or subcommittee thereof, of the constitutional convention to be held in the year nineteen hundred sixty-seven.

(b) "Hearing". Any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing". Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing". Any hearing other than a public hearing.

2. No person may be required to appear at a hearing or to testify at a hearing unless there has been personally served upon him prior to the time when he is required to appear, a copy of this section, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summoned.

3. A witness summoned to go a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

4. A complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testify, the witness shall be entitled to a copy of such testimony, at his own expense, provided the same is available, and provided further that the furnishing of such copy will not prejudice the public safety or security.

5. A witness who testifies at any hearing shall have the right at the conclusion of his examination to file a brief sworn statement relevant to his testimony for incorporation in the record of the investigatory proceeding.

6. Any person whose name is mentioned or who is specifically identified and who believes that testimony or other evidence given at a public hearing or comment made by any member of the agency or its counsel at such hearing tends to defame him or otherwise adversely affect his reputation shall have the right, either to appear personally before the agency and testify in his own behalf as to matters relevant to the testimony or other evidence complained of, or in the alternative at the option of the agency, to file a statement of facts under oath relating solely to matters relevant to the testimony or other evidence complained of, which statement shall be incorporated in the record of the investigatory proceeding.

7. Nothing herein contained shall be construed to prevent an agency from granting to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine.

8. Except in the course of a subsequent hearing which is open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview conducted before a single-member agency in the course of its investigation shall be

disseminated or made available to the public by said agency, its counsel or employees without the approval of the head of the agency. Except in the course of a subsequent hearing open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. Any person who violates the provisions of this subdivision shall be guilty of a misdemeanor.

9. No temporary state commission having more than two members shall have the power to take testimony at a public or private hearing unless at least two of its members are present at such hearing.

10. Nothing herein contained shall be construed to effect, diminish or impair the right, under any other provision of law, rule or custom, of any member or group of members of a committee or other multi-member investigating agency to file a statement or statements of minority views to accompany and be released with or subsequent to the report of the committee or agency.

NEW YORK CONSTITUTION, ARTICLE III

Sec. 11. For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.